

STATE OF MICHIGAN
COURT OF APPEALS

KIMBERLY LAUER-DELUCA,

Plaintiff-Appellant,

v

HSBC BANK USA and LITTON LOAN
SERVICING,

Defendants-Appellees.

UNPUBLISHED

November 10, 2011

No. 299042

Kent Circuit Court

LC No. 10-003003-CH

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition to defendants in this action arising from the servicing of, and eventual foreclosure on, plaintiff's mortgage loan. We affirm.

The sole issue presented on appeal is whether the trial court erred by not considering the allegations set forth in plaintiff's verified complaint as equivalent to an affidavit, or other evidence, submitted in opposition to defendants' motion for summary disposition. Plaintiff argues that her verified complaint was sufficient, in lieu of an affidavit, to withstand a motion for summary disposition under MCR 2.116(C)(10). We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo, reviewing the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006); *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). Accordingly, this Court's review is limited to the evidence presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009). "In evaluating a motion for summary disposition brought under [MCR 2.116(C)(10)], a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Summary disposition is proper where the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); (G)(4); *Coblentz*, 475 Mich at 568. A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, leaves open an issue

upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

When bringing a motion under MCR 2.116(C)(10), the moving party must specifically identify the matters that have no disputed factual issues; the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b), (4); *Coblentz*, 475 Mich at 569. The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, material to the dispositive legal claims, warranting a trial. MCR 2.116(G)(4); *Coblentz*, 475 Mich at 569; *Auto Club Ins Ass'n v State Auto Mut Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003). The existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002); *Barnard Mfg Co v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009).

MCR 2.116(G)(4) specifically precludes plaintiff, as the non-moving party, from simply relying on the allegations set forth in her complaint in opposition to defendants' properly supported motion for summary disposition under MCR 2.116(C)(10). MCR 2.116(G)(4) provides:

A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party *may not rest upon the mere allegations or denials of his or her pleading, but must by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial*. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her. [Emphasis added.]

Plainly, as our Supreme Court observed in *Coblentz*, 475 Mich at 569, “[u]nder [MCR 2.116(G)(4)], a plaintiff cannot rest solely on its complaint. Affidavits, pleadings, depositions, admissions, or other documentary evidence *must* be offered to survive summary disposition.” (Emphasis added.)

Plaintiff argues on appeal that, contrary to the plain language of MCR 2.116(G)(4), she was permitted to “rest upon the mere allegations” of her complaint, because that complaint was verified by way of the following statement, rendering it the “equivalent” of an affidavit:

I, Kimberly Lauer-Deluca, have read and make this verified complaint and attest that those facts stated of my own knowledge are true and those matters stated of which I have been informed I believe to be true after reasonable inquiry.

We disagree.

MCR 2.119(B)(1) requires that affidavits filed in opposition to a motion

(a) be made on personal knowledge;

(b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and

(c) show affirmatively that the affiant, if sworn as a witness can testify competently to the facts stated in the affidavit.

Plaintiff's verification does not meet these criteria. As this Court explained in *Miller v Rondeau*, 174 Mich App 483, 487; 436 NW2d 393 (1988),

the requirements regarding the form of verification for a pleading and the form of an affidavit are significantly different. For example, a pleading may be verified merely by the declaration that the statements in the pleading are true and accurate to the best of the signer's information, knowledge and belief, MCR 2.114(A)(1)(b), whereas an affidavit filed in support of a motion must be made on personal knowledge, stating with particularity facts admissible as evidence establishing the grounds stated in the motion and showing affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit, MCR 2.119(B)(1).

Plaintiff's complaint did not allege facts solely based on her own personal knowledge, as opposed to those matters stated upon plaintiff's information and belief. And, her verification does not specify those matters upon which plaintiff can competently testify. As this Court observed in *Miller*, "[t]he verified pleadings . . . contain no statements sufficient to satisfy the criteria applicable to affidavits filed in support of a motion." *Id.* at 487. Accordingly, plaintiff failed to meet her burden of establishing a genuine issue of material fact precluding summary disposition.

Plaintiff urges this Court to conclude that any deficiencies in her verification precluding consideration of her complaint as equivalent to an affidavit were harmless. Plaintiff observes that this Court has held that the failure of an affidavit to comply with the court rules is harmless absent a showing of prejudice resulting from the noncompliance. See *Baker v DEC Int'l*, 218 Mich App 248, 261-262; 553 NW2d 667 (1996), rev'd in part on other grounds 458 Mich 247 (1998). However, here, unlike in *Baker*, plaintiff failed to submit any affidavit whatsoever in opposition to defendants' motion. Thus, the issue is not whether a defect in the affidavit submitted was harmless, but rather, whether plaintiff can "rest upon the mere allegations" of her complaint in lieu of submitting any affidavit at all. MCR 2.116(G)(4) specifically provides that plaintiff may not do so. *Coblentz*, 475 Mich at 569.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Douglas B. Shapiro